## United States Court of Appeals for the Second Circuit



# BRIEF FOR APPELLEE

76-7244

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IRVIN GILL, ROBERT ZIEGLAR, KATHERINE HARRIS, MARIE FITZHUGH, CHARLES CAMPBELL, INFZ PAGE, DOROTHY DOBSON, RAVELLA FLOYD, INEZ CHARLES, EVELYN FAIRWELL, ALICE ZEALY, GEORGE HOLMES, ENOCH MARRISON, RUBY BLACKWELL, ROSIE LEE SAILES, BETTY JO TRAVIS, DOROTHY LATHAM, LUTHER ROBINSON, ELADIA FUENTES, VELMA WILLIAMS, DOLORES ALLEN, VIVIAN SILAS, BEATRICE HILL, SALENA MATTHEWS, ANNIE HICKS, HARRIET WEATHERS, LINDA GAFFNEY, GRACE RUTHERFORD, DORETHA DIGGS, STELLA HOLMES MC DONALD, DAISY MAY BANKS, MICHELLE COURNOYER, LUZ MARTINEZ, MARIE WARE, ALBERTA FERGUSON, SADIE JOHNSON, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

-vs-

MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, JAMES REED, Director of Monroe County Department of Social Services, MONROE COUNTY CIVIL SERVICE COMMITTEE OFFICE OF CIVIL SERVICE AND PERSONNEL OF MONROE COUNTY, FRED LAPPLE, Executive Director, Office of Civil Service and Personnel of Monroe County, GABRIEL RUSSO, Director of Human Resources of Monroe County and MONROE COUNTY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

SEP 1 5 1976

A DANKEL FUSARO, CLERK

SECOND CIRCUIT

DEFENDANTS-APPELLEES BRIEF

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#### STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e)(f)

- (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.
- (f) Civil action by Commission, Attorney General, or person aggrieved. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving

a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent. named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

#### 42 U.S.C. §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full andequal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

#### 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Constitution, First Amendment

Congress shall make no law respecting . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Ninth Amendment

The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### STATEMENT OF ISSUES PRESENTED

- 1. Are the complaints barred by the Statute of Limitations and otherwise untimely under applicable law?
- 2. Does the complaint fail to state a cause of action?
- 3. Do the plaintiffs in this case lack standing under federal law?
- 4. Is this suit defective by its inclusion of improper parties and plaintiffs' failure to name indispensable party defendants?
- 5. Does failure to dismiss this defective complaint and cause of action injury the named defendants irreparably with no means of relief?

#### STATEMENT OF FACTS

This is an appeal from an Order and determination by the Hon. Harold P. Burke entered April 21, 1976, (312-313)\* which Order and decision dismissed Plaintiff's complaint and causes of action based on Title VII of the Civil Rights Act of 1964 as amended March 24, 1972 (42 U.S.C. § 2000 et seq.), 42 U.S.C. § 1981 and 1983 and U.S. Constitution, 1st, 9th, 14th Amendment (50-53).

This lawsuit was commenced on November 24, 1975 (82) allegedly based upon acts of discrimination in employment, seeking injunctive relief, declaratory judgment and monetary damages in the amount of \$40,000,000.00. Notice of Right to Sue for the U.S. Department of Justice were issued to some of the original plaintiffs on October 14, 1975, against the Defendant-Appellee Monroe County Department of Social Services alone. (59-126).

On September 28, 1973, Plaintiffs-Appellants Fitzhugh, Gill and Zieglar filed charges of employment discrimination with the N.Y.S. Division of Human Rights which charges are still pending.<sup>2</sup>

<sup>\*</sup>Note: Numbers in parenthesis refer to page numbers of the joint appendix already before this court.

No Notices of Right to Sue are part of the record for Plaintiffs Luz Martinez, Marie Ware, Alberta Ferguson, Sadie Johnson and presumably the Notice of Rosie Lee Robinson (119) is meant for Rosie Lee Sailes.

During the course of said proceeding and prior to the dismissal of this action pursuant to the Supreme Court Order of the Hon. Wilmer J. Patlow (see Exhibit A annexed) dated December 11, 1975, the personal files of all of the above named Plaintiffs have been made available to the Plaintiffs for Xerox copying, as well as the personal files of the first 55 other individuals listed in the Federal Notice to Procedure (161-163) and other material requested in this federal proceeding.

Also in September of 1973 the Plaintiffs, Gill, Zieglar, Fitzhugh, Harris, Campbell, Hicks, Page, Gaffney, Floyd, Fairwell, Matthews, Sailes, Zealy, Rutherford, Weathers, Holmes, Morrison, Blackwell, Dobson, Cournoyer, Robinson, Travis, Latham, Charles, Diggs, Sials, McDonald, Banks. Fuentes, Allen, Martinez, Hill and Williams filed charges with the Equal Employment Opportunity Commission for alleged acts of discrimination in employment during the period from 1958 until December, 1971. These general allegations follow and essentially embodied in the complaints already before this court (3-57). The Plaintiffs consist of 36 named individuals both minority and non-minority persons and among these individuals are differences as to those who meet various New York State Civil Service test and qualifications and those who do not and further there are distinctions as to those Plaintiffs who have passed certain qualifications and tests and those who refused to even attempt to meet any such requirements. There are several further distinctions among the Plaintiff-Appellants as more fully set forth in the body of their brief and in the pleadings already before this court.

The Equal Employment Opportunity Commission did issue a determination (280-284) dated June 27, 1974. The Commission after an exhaustive nine month investigation, found no probable cause for the charge of discrimination in hiring but based primarily on

<sup>3</sup>The entire EEOC file complete with investigator's reports, statistical information, interview summaries, as well as copies of the Defendant-Appellees records have been made available to both plaintiff-Appellants and Defendant-Appellees since July 1, 1974 (see Exhibit B annexed.)

statistical inferences alone, did make a finding of probable cause as to possible discrimination in promotional practices.

Throughout the ( ire EEOC proceeding only Defendant-Appellee Monroe County Department of Social Services and Defendant-Appellee Monroe County Civil Service Commission have been named as Respondents (281). After the filing of this determination with both Plaintiffs and Defendants there then followed a series of meetings and conferences through the parties respective representatives and Erma S. Clark, the duly appointed Federal conciliator for the Equal Employment Opportunity Commission. Ms. Clark did mediate and arrange said conferences and through her efforts and the efforts of the Equal Employment Opportunity Commission, a comprehensive conciliation agreement was drawn up and submitted to all parties concerned. The Defendant-Appellees have already unilaterally complied with said conciliation agreement in many ways.

On or about July 15, 1975, the Defendants were notified by letter (see Exhibit C annexed) that the agreement was unilaterally and without stated reason rejected by Plaintiffs through their attorney, Emmelyn Logan-Baldwin. After service of the aforesaid complaints upon the Defendant-Appellees, they through their respective counsels, did on or about December 17, 1975, serve Answers, Affirmative Defenses, Counter-Claims and Motions to Dismiss upon the court and Plaintiff's counsel. A reply to the counter-claim was the sole response of the plaintiffs and this was received by

<sup>&</sup>lt;sup>4</sup>Such suggestions as wider posting of promotional notices have been corrected as of early 1973 (283), appointment of affirmative action officer and such affirmative action programs were in operation long before this suit was commenced.

the Defendants-Appellees on or about December 18, 1975. On or about January 5, 1976, the Defendants-Appellees through their counsel received a ruling in a letter form (303) dated December 30, 1975, and signed by the Hon. Harold P. Burke, District Court Judge, that as to the Motions to Dismiss, the Defendants-Appellees pleadings were defective as to form. Pursuant to said ruling, Defendants-Appellees redrafted and resubmitted their Motions to Dismiss on or about January 14 and 16, 1976 respectively, the return date being January 26, 1976. On motion of the Plaintiffs-Appellants attorney, the return date was adjourned to February 9, 1976 and so it came to be heard on that date.

Shortly after receiving the aforesaid letter ruling by Judge Burke the Plaintiffs-Appellants had made various additional discovery demands (160, 183, 221, 223, 225, 227) which demands were objected to (229, 239) but the court at the initial court appearance on January 26, 1976, did orally stay said demands and responses pending the final outcome of the Defendants-Appellees motions to dismiss.

All parties agree that as to the Plaintiff Michelle Cournoyer, she be allowed to withdraw as a party to this lawsuit. There is a question as to whether said Plaintiff Cournoyer authorized said suit (296-298) but it is agreed that she be allowed to withdraw in any event. It is acknowledged that as to a number of other

Defendants-Appellees have objected to inclusion of the discovery motions and related pleading in this record as not being a part of the order and decision of Judge Burke appealled from and since technically they have not been dismissed but are still currently pending.

party plaintiffs, they are not presently employed by the Monroe County Department of Social Services (see Plaintiffs-Appellants' Statement of Facts).

A Decision and Order dated April 21, 1976, (312-313) the Defendants-Appellees' Motion to Dismiss were granted and the Defendants-Appellants actions dismissed for ( . . . failure to state a cause of action, plaintiffs) lack of stainding to bring this suit, the action is bared by the statute of limitations, and the New York State Department of Social Services and the New York State Civil Service Commission in the respective Directors in indispensible defendants." (313) A Notice of Appeal dated May 14, 1976 from the aforesaid Decision and Order was filed (318) on behalf of all of the above named Plaintiffs-Appellants, but not for the Plaintiff-Appellant Michelle Conoyer.

#### POINT I

## THE COMPLAINTS ARE BARRED BY THE STATUTE OF LIMITATIONS AND ARE OTHERWISE UNTIMELY UNDER APPLICABLE LAW

Approaching the first basis for dismissal of the plaintiffs' case, one need only turn to the latest Supreme Court case on the matter Brown v. General Services Administration et al. (June 1, 1976) Docket No. 74-768, 44 Law Week 4704 at 4706;

"This unabiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive pre-emptive administrative and judicial scheme for the redress of federal employment discrimination . . . for the structure of the 1970 amendment itself fully confirms the conclusion that congress intended it to be exclusive and pre-emptive."

Clearly the Equal Employment Opportunity Act as amended in 1972 applies to State and local government employees in the same manner. For as the court in Brown, supra, at 4705;

"Although federal employment discrimination clearly violates both the Constitution, Bolling v. Sharpe, 346 U.S. 497 (1954) and Statutory Law, 5 U.S.C. §7151 before passage of the 1972 act, the effective availability of either administrative or judicial relief was far from sure."

And, indeed, a precisely drawn, detailed statute pre-empts more general remedies. Preiser v. Rodriguez, 411 U.S. 470; 507 F. 2d 1300 aff'd. The court in Brown, supra, distinguished Johnson v. Railway Express Agency, Inc., 421 U.S. 454, in dismissing the Brown complaint as untimely filed. As the court in Brown, supra, 4707 again pointed out;

"The balance completeness and structural integrity of §717 are inconsistent with the petitioner's contention that the judicial remedy afforded by &717(c) was designed merely to supplement other punitive judicial relief. His view fails, in our estimation, to accord due weight to the fact that

unlike these other supposed remedies, §717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement power . . . It would require the suspension of disbelief to ascribe to congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."

The court at page 4708 in Brown, supra, then went on to describe similar results in other federal employee cases, e.g. United States v. Demko, 385 U.S. 149 (1966); Patterson v. United States, 359 U.S. 495 (1959); Johansen v. United States, 343 U.S. 427 (1952). Thus, in the instant case, as in the Brown case above cited, plaintiffs reliance upon 42 U.S.C. §1981 and 1983, as well as the First, Ninth and Fourteenth Amendments of the Constitution are misplaced. Title VII is the all inclusive dominate statute complete with administrative relief, so that acts complained of, prior to March 24, 1972, are automatically barred as a matter of law. Henderson v. First National Bank, (1973) 360 F. Supp. 531.

Assuming arguendo that Title VII did not exist, and in fact not so clearly ruled, plaintiffs would still be barred as this action would be governed by the applicable New York State Statute of Limitation in a federal civil rights action. Swan v. Board of Higher Education, 319 F. 2d 56 (1963) Where the court held that where there is not a specific statutory period delineated the applicable period of limitation is that which the State of New York will use if the action had been brought before their court. This reasoning was followed in Ortez v. LaDalle, 442 F. 2d 912 (1971) where the court ruled that the appropriate New York Limitation was three years with reference to CPLR §214 subsection (2) for "an action to recover upon a liability . . . created or im-

posed by statute . . . " Again the court in <u>Kaiser v. Cahn</u>, 510 F. 2d 282, where the court again used the principle that where no specific statute of limitations exists the federal court borrows the applicable state statute and specifically applies this to federal civil rights actions.

Nor can a plaintiff state that Title VII tolled any of these applicable state statutes of limitations and causes of action.

Johnson v. Goodyear Tire and Rubber Co., (1974) 491 F. 2d 1364;

Boshell v. Ala. Mental Health Board, (1973) 473 F. 2d 1969. Indeed any individual whose claims are time barred by the statute of limitations should be excluded from the class in any suit under Title VII or any other related sections quoted and relief upon by the plaintiff. Wetzel v. Liberty Mutual Insurance Co., 508 F. 2d 239. Brady v. Bristol Myers, Inc., (1971) 332 F. Supp. 1995.

In fact, although the court in <u>Kaiser</u> and <u>Ortez</u> used a three year New York State Statute of Limitations, if one follows the reasoning in <u>Alexander v. Gardner Denver Co.</u>, 415 U.S. 36 (1974) which shows the congressional intent to formulate a dual federal and state system, designed to prohibit and abolish racial discrimination and other acts and which constitutes such a <u>parallel</u> federal and state system, then we must examine the New York State law which is equivalent to Title VII and 42 U.S.C. §1981, 1983, etc., and that New York State equivalent law is Section 296 et. Seq. of the New York State Executive Law, commonly referred to as the Human Rights Law. The applicable statute of limitation under that law is one year. State Division of Human Rights on complaint of

Barbarba Noble v. University of Rochester, et al., (July 12, 1976)
Case No. 370 (annexed hereto and made a part hereof); and the
cases cited therein. U.S. v. Gas Power Co., (1973) 474 F. 2d 906.

Thus, the most liberal interpretation as to any statute of limitation to plaintiffs' causes of action would bar any acts prior to December 1, 1972, and could conceiveably bar any act prior to December 1, 1974. A time barred complaint must thus be dismissed.

DeMatteis v. Eastman Kodak Company, (1975) 511 F. 2d 306.

At any rate the Supreme Court in Brown, supra, and also in Washington v. Davis (June 7, 1976) No. 74-1490, 44 4780, clearly establishes the pre-emption of Title VII to the plaintiffs' causes of action and the inapplicability of the other statutes and amendments attempted to be relied upon by the plaintiffs. Returning to Title VII of the Civil Rights Act as amended in 1972, 42 U.S. §2000 e-5(e), ". . . the charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practices) shall be served upon the person against who such charge is made . . . " Troy v. Shell Oil Co., (1975) 519 F. 2d 403. There are only three named plaintiffs, Gill, Zieglar and Fitzhugh who filed charges of discrimination with the New York State Division of Human Rights and as to these plaintiffs the time period for filing of charges is extended to three hundred days. It is painfully obvious that none of the above named plaintiffs filed their charges with the EEOC within one hundred and eighty days, or in the case of plaintiffs, Zieglar, Gill and Fitzhugh, within three

hundred days of the date of the occurrence of the acts of which they complain. Nor, in fact, have the plaintiffs, even to this date, specifically informed the respondents as to the date, time, acts or policies complained of against the respondents. This is a mystery which the defendants have still not been able to solve. In other words, what have the defendants done wrong. What specifically do the plaintiffs complain of. And in this regard the plaintiffs have never actually answered.

Under 42 U.S.C. §2000 e-5(f) plaintiffs have one hundred and eighty days, or in the case of plaintiffs Gill, Zieglar and Fitzhugh, three hundred days in which to commence their lawsuit.

Dudley v. Textron Inc., 386 F. Supp. 602. Title VII operates prospectively only and courts are not concerned about terms and conditions of employment prior to its effective date. Henderson v. First National Bank, supra. Nor can the courts look to the period of time after commencement of suit for determining liability under Title VII. Nance v. Union Carbide Corp., (1975) 397 F. Supp. 436.

It is clear that the charges filed with EEOC encompassed by their determination of June 27, 1974 (284), which was a final determination are now time barred. DeMattes v. Eastman Kodak Company, supra; Brown v. General Services Administration, et al., supra. Nor can the plaintiffs rely upon the actions of EEOC or any other individual or agency by way of tolling the statutory requirements of timelyness imposed by Title VII since the plaintiffs did not have to wait for an action by either the Justice Department nor did they have to wait until the conciliation proceeding was complete before they could have commenced a Title VII act. Jackson v. Cutter Lab. Inc., (1972) 338 F. Supp. 882; Wong v.

LaBon Marche, (1975) 508 F. 2d 1249; Gamble v. Binghamton, (1975) 514 F. 2d 648; U.S. v. Allegheny Ludlin Industries Inc., (1975) 517 F. 2d 826.

Plaintiff-Appellants rely upon Egelston v. State University College at Geneseo, (June 7, 1976) Opinion No. 1050; Noble v. University of Rochester, (June 7, 1976) Opinion No. 1115 and Johnson v. Railway Express Agency Inc., 421 U.S. 454, is clearly misplaced and inapplicable here. First and foremost because the United States Supreme Court in Brown, supra, has clearly distinguished between private employers' obligations under Title VII and other similar statutes and the current Defendant-Appellees who are local governments and subdivisions of the State of New York to whom Title VII is the exclusive pre-emptive remedy which did not apply until the 1972 amendment. Second, the Brown and Washington v. Davis cases above cited, clearly point out the stringent and narrow construction which the courts must take in regards to timelyness and statute of limitations would apply to governmental subdivisions. Third, in direct constrast to the Egelston and Noble cases above cited, the current Plaintiff-Appellants have had the use of extensive disclosure material, responsive pleadings and EEOC filing reports and determination material all before the dismissal of this cause of action (see Statement of Facts).

Nor can the plaintiffs rely upon their magic phrase of Ppattern and practice of discrimination" to satisfy the federal requirements of Title VII. A plaintiff must allege facts sufficient such that a court may reasonably infer a pattern and practice of discrimination. less the phrase has no meaning whatsoever

but is a catchall to prevent any complaint from ever being dismissed. Thus, if the plaintiffs should complain about a particular promotion as being discriminatory, that wrong is not a continuing wrong because a promotion is a single act. State Division of Human Rights on complaint of Noble v. University of Rochester, et al., supra; Matter of Munger v. State Division of Human Rights, 32 App. Div. 2d 502; Romano v. Romano, 19 N.Y. 2d 444. Likewise, a civil service examination is a single act, or occurrence, having a definite time, place and subject matter; but the complaint notably lacks any such specificity or collection of one or more such acts such as would lend itself to the interpretation of a pattern and practice of discrimination. As a matter of fact, as pointed out elsewherein this brief, and in response to a memo submitted to the EEOC, several of the named plaintiffs have never even applied for positions they complain about not receiving nor taken civil service examinations which they allege to be unfair. (See Exhibit D annexed.) Thus, the complaint is barred by the applicable statute of limitations. EEOC v. Griffin Wheel Co., (1975) 511 F. 2d 456; Olsor v. Rembrandt Painting Co., (1975) 511 F. 2d 1228.

#### POINT II

#### THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

The most basic requirements of jurisdiction standing federal questions and other prerequisites to a federal court case according to the Federal Rule of Procedure and outlined as defense by the Federal Rule of Procedure, Rules 12, 23 and 46 as well as Title 42 U.S.C., have not been met by the plaintiffs in the instant case. The determination of the Equal Employment Opportunity Commission states that the above named defendants have

"... have no pattern or practice of discrimination exists with respect to ... general hiring practices." (281) and it must be given great weight. Manhart v. L. A. Dept. Water (1975) 387 F. Supp. 980; Sale v. Waverly-Schell Roch Board of Education (1975) 390 F. Supp. 784.

As to the finding of probable cause in promotional practices, there are no specific allegations in the plaintiffs' complaint or subsequent pleadings which bear this out, and defendants having gone forward with proof as to its testing procedures and posting of promotional openings and affirmative action programs (see statement of facts p. 3) are entitled to the inference that these acts are proper when the only evidence contra is speculative and statistical. Washington v. Davis, supra; Penn v. O'Neill, (1973) 473 F. 2d 1029.

As to the First, Ninth and Fourteenth Amendments as well as 42 U.S.C. §1981, 1983, a plaintiff needs specific allegations showing intentional discrimination. Zichy v. Philly (1975) 393 F.

Supp. 338; <u>Washington v. Davis</u>, supra. The Federal Courts have frowned on using these sections to circumvent the preferred policy of exhaustion of the administrative and other remedies contained in 42 U.S.C. §§2000c., et seq.; <u>Kinsey v. Legg</u> (1972) 60 F RD 91.

It is painfully obvious that the plaintiffs must satisfy the jurisdictional requirements of constitutional and federal law for this court to hear the case. Central Mexico Light and Power Commany v. Munch, 116 F. 2d 85. The general rule is that the presence of a federal question is to be determined solely by the substance of the plaintiffs' complaint. Downing v. Howard, 62 F. Supp. 6 aff'd. 162 F. Supp. 654; 332 US 818; Alan v. Clark, 22 D. Supp. 898. And indeed, without such a valid federal question and federal jurisdiction there is no basis for entertainment of this case in this court. See Moore's Manual, §5.07 and the cases cited thereunder.

Turning again to the lack of jurisdiction of federal court in this particular case, it goes without saying that the laintiffs have failed to establish any federal question under 42 U.S.C. 1983. The County of Monroe and its Department of Social Services cannot be sued under 42 U.S.C. §1983. See Meyer v. State of New Jersey, 460 F. 2d 1252 (C.A. Pa., 1972); Meyer v. State of New York, 344 F. Supp. 1377 (D.C.N.Y. 1971); Harty v. Rockefeller, 338 F. Supp 367 (D.C.N.Y. 1972); Shapiro v. State of Maryland, 366 F. Supp. 1205 (D.C. Md. 1972); Paulak v. Duffy, 48 F.R.D. 396 (D.C. Conn. 1969); Cheramic v. Tucker, 493 F. 2d 586 (C.A. La. 1974). The second court in its decision of Gonzales, et al. v. Lavine, copy annexed, said:

"There is no federal-question subject-matter jurisdiction. There is no colorable constitutional issue. The basis of classification under attack is not shown to be unreasonable. Eisen v. Eastman, 421 F. 2d 560 (2 cir. 1969). Russo v. Korkby, 453 F. 2d 548, 551 (2 cir. 1972)."

Having never been named as defendants before the Equal Employment Opportunity Commission, previous to the Title VII suit, the suit <u>must be dismissed</u> as to defendants James Reed, Frederick Lapple and Gabriel Russo. <u>LeBeau v. Libby-Owens-Ford Co.</u>, (1973) 484 F. 2d 798; <u>Escamilla v. Mosher Steel Co.</u> (1975) 386 F. Supp. 101; <u>Equal Employment Opportunity Commission v. MacMillan Bloedel Container Inc.</u> (1974) 503 F. 2d 1086.

The complaint does not allege facts sufficient to state claims upon which relief can be granted. Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F. 2d 620 (2 cir. 1972).

In fact the complaint is devoid of specific allegations as to discrimination at all but merely repeats the magic phrase "policy and practice of discrimination" without saying what defendants allegedly did wrong. Initial burden of establishing prima facie case is on plaintiffs, especially where as here, it is not a layman drawing the complaint but a skilled lawyer with a great amount of experience in the Title VII field. Robinson v. Dallas (1975) 514 F. 2d 1271; Peters v. Jefferson Chem. Co., 516 F. 2d 447; Dozier v. Chupka (1975) 395 F. Supp. 836.

plaintiffs have clearly failed to meet even the liberal prima facie burden as set forth in <u>Griggs v. Duke Power Co.</u> (1971) 401 U.S. 424, and as each allegation of wrong under Title VII (such as they are, general, vague and conclusionary) it has been answered

By the defendants with no reply by plaintiffs, again failing to meet the prima facie test. Napper v. Schnipke (1975) 393 F. Supp. 379.

#### POINT III

### THE PLAINTIFFS IN THIS CASE LACK STANDING UNDER FEDERAL LAW

It is plainly obvious that in any federal case, the requirements of sufficient standing to maintain the actions must be met. Any party failing to meet said requirements must of necessity have his claim dismissed. One need only examine the plaintiffs' complaint to see the total failure of each of the parties to establish this federal prerequisite.

Plaintiffs: Linda Gaffney (42-43)
Michele Cournoyer (46-47)

As to these two white plaintiffs, it is obvious that they do not in any way satisfy Title 42 U.S.C. nor do they fit any other constitutional or code provision cited nor is there any such provision in federal law for a suit in damages for "embarrassment or lost opportunities to be supervised by minority employees." Indeed, this seems a perversion and contradiction with the thrust of the complaint which alleges as its purpose a protection of minority rights alleged to have been violated where these parties are both non-minority and fail to allege any discrimination against themselves. Indeed, as set forth in the pleadings, plaintiff cournoyer by agreement of all parties has requested that she be dropped from this action, ad we agree, and it could be argued that she should never have been a party plaintiff in the first place and neither should plaintiff Gaffney. Ripp v. Dobbs House Inc. (1972) 366 F. Supp. 205.

Plaintiffs: Blackwell (30) Weathers (41-42)
Fuentes (34-35) Diggs (44-45)
Williams (35-36) McDonald (45)
Ware (48-49)
Ferguson (49-50)
Matthews (40-41) Johnson (50)

These plaintiffs have, by their own admissions, refused to even take the various civil service exams which are falsely alleged to be discriminatory. All have resigned on their own from the department without ever attempting to meet the various tests and/or qualification requirements, and in the case of resignation, without having charged, previous to this proceeding, any such discrimination. There can be no discrimination alleged or complained of when the actions or inactions alleged to be discriminatory are the acts of the plaintiffs themselves, the classic federal definition of Estoppel. See Moore's Manual, Estoppel. One cannot complain about the unfairness of the examination if one refuses to even take it and clearly the above enumerated requirements of standing and federal court jurisdiction are lacking as to all of these plaintiffs. Equal Employment Opportunity Commission v. Detroit Edison Co. (1975) 515 F. 2d 301; Washington v. Davis, supra.

> Plaintiffs: Fairwell (25-26) Floyd (24-25) Hill (39-40)

These plaintiffs, admittedly now promoted, now refer to qualification requirements which have since been changed to allow their promotions as being discriminatory. These paragraphs could be struck as being vague and indeed by the plaintiffs having overcome any alleged discrimination, they have no right to commence an action which alleges "a continuing pattern and practice of dis-

crimination," when by their own allegations they acknowledge that as to themselves, the alleged discrimination is ended. Assuming arguendo, that said discrimination in the past did exist and further that they were not barred by any statute of limitations or inapplicability of Title VII, they have not even attempted to administratively exhaust their remedies. They must, as a matter of law, be struck from these proceedings. Jones v. U.S. Government Improvement Corp. (1974) 383 F. Supp. 420.

Plaintiffs: Campbell (21-22) Travis (31-32)
Harris (19) Robinson (33-34)
Dobson (23-24) Martinez (47-48)
Charles (25) Hicks (41)
Zealy (26-27) Rutherford (43-44)
Sailes (30-31)

These plaintiffs all snare in common, that they have at various times, failed a civil service examination and/or educational or job qualifications since eliminated. None of the named respondents can be charged with any inherent discrimination in these exams which they had no part in drafting. But even if they could, under current case law, the question of the constitutionality of New York State Civil Service Law and the New York State Civil Service system has been tested against the Constitution of the United States and Title VII successfully. Washington v. Davis, supra; People v. Gaftney, 142 AD 122, 126 NYS 2d, 1027; Sable v. Pinkard, 71 Misc. 2d 126, 335 NY Supp. 2d 34; State Division of Human Rights v. The City of Schenectady, 76 Misc. 2d 43, 351 NY Supp. 290.

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Plaintiffs: Holmes (27-29)
Morrison (29)
Latham (32)
Banks (22-23)

None of these plaintiffs show sufficient exhaustion of administrative remedies and further none present a federal question or allege deprivation under Title VII of the Civil Rights Law as amended in 1972. Equal Employment Opportunity Commission v. General Electric Co., 376 F. Supp. 757.

Plaintiffs: Zieglar (18)
Gill (17)
Fitzhugh (19-21)

These plaintiffs are premature in this federal case since they are currently in the middle of litigation before a referee appointed by the New York State Division of Human Rights and are awaiting trial on essentially the same charges of discrimination which are currently alleged before this court. In addition, they have all been promoted to the positions sought long before commencement of this suit, Troy v. Shell Oil Co., supra, which is now moot. It is only if they fail to get adequate relief that they should then seek the wider powers of the federal court. It is especially humerous that these individuals who have benefitted by provisional appointments and civil service lists should sue on the use by Defendants of same as to others.

Additional comments should be made as to the New York State Civil Service system which is imposed upon the defendants under New York State statute and law, and the New York State Civil Service Commission, who administers same, none of whom are parties to the proceeding. These are clear violations of Federal Rules 19 and 21. If the plaintiffs' theory is a constitutional attack upon the use by the defendants of New York State Civil Service Law or the obedience to said State statutes due to the fact that

a number of the plaintiffs are black, then the court should take judicial notice of the opinion in <u>Jackson v. Poston</u>, 40 AD 2d 19, on the question of the constitutionality of the Civil Service Law referred to and which quoted at length from <u>Griggs v. Duke Power Co.</u>, supra, and especially at pages 430-431 emphasize that a uniform means of selecting individuals was not unconstitutional provided fairly applied and bore a reasonable relationship to the job in question and rejected any <u>absolute preference for color</u>. (See also <u>U.S. v. H. K. Porter Co.</u>, 296 F. Supp. 40) In addition, a three judge federal court in <u>Koscherak v. Schmeller</u>, et al., formally ruled in favor of the constitutionality of Section 61 of the New York State Civil Service Law in general and the rule of three in particular. (Opinion annexed)

In addition, a close examination of the United States Federal Civil Service Commission which is set forth in Title V. U.S.C. \$\\$3305 through 3310 indicates that the New York State system parallels the federal system and is indeed constitutional. Title V provides in \$3304(a)

"The President may prescribe rules which shall provide as nearly as conditions of good administration warrant for one open competitive examination for testing applicants in the competitive service which are as practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicant for the appointment sought."

Again, Title V provides in §3361

"Promotion - an individual may be promoted in the competitive service only if he has passed an examination or is specifically exempted from an exam . . ."

#### POINT IV

THIS SUIT IS DEFECTIVE BY ITS INCLUSION OF IMPROPER PARTIES AND PLAINTIFFS' FAILURE TO NAME INDISPENSABLE PARTY DEFENDANTS.

It has been previously pointed out that the lawsuit should be dismissed against defendants Monroe County Civil Service Commission, Fred Lapple, Gabriel Russo and James Reed for it is jurisdictional that a defendant be charged as a respondent before the EEOC before one can commence a suit against them. LeBeau v. Libby Owens Ford Co., supra; Scott v. University of Delaware (1974) 385 F. Supp. 937; Escamilla v. Mosher Steel Co. (1975), supra. In addition, a review of the aforesaid complaint in the above entitled case reveals no specific allegations of misconduct or wrongful action against any of the above named defendants. This having been previously pointed out earlier in this brief, it is a precondition to filing a lawsuit that a charge against a specific respondent be made with EEOC both by way of notice to the individual of the wrongful conduct and also for purposes of conciliation.

"Summary judgment procedure prescribed in Rule 56 of the Federal Rules of Procedure is a device for promptly disposing of actions in which there is no genuine issue as to any material facts. In many cases, there is no genuine issue of fact, although such an issue is raised by the formal pleadings. The purpose of Rule 56 is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense."

"The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial."

Moore's Manual, pages 1271-1272; Richard v. Credit Suisse, 242 NY 347; Burgent v. Union, PRR 24 F. 2d 207.

Both Rules 20 and 23 of the Federal Rules of Civil Procedure require common questions of law in fact and just as Rule 20 (a) of the Federal Rules requires all persons of a common factual or legal question to join as party plaintiffs, so also do the Federal Rules require the joining of all common or necessary party defendants. The basis in Federal Rules for this requirement is obviously to eliminate multitudinous court proceedings and also to fairly and completely try any issue to its final conclusion.

This is especially important in the instant case when both under the New York State Civil Service Law and the New York State Social Services Law the respective defendants Monroe County Department of Social Services and Monroe County Civil Service Commission are totally and completely under the absolute authority of their State agencies. Any questions as to Civil Service examinations, all of which in the instant case were State examinations, is totally within the absolute administration and control of the New York State Civil Service Commission. In addition, any complaint in regard to job title, position or promotions or administration of the Social Services Law is likewise subject to the authority and absolute control of the Social Services Law of the New York State Department of Social Services. It is strangely significant that even under obvious facts that the plaintiffs in the proceeding choose to ignore and avoid naming such State agencies as party defendants. This is especially disadvantageous to the named party respondents in that information necessary for a defense (i.e., consolidation, study, State law and rules, policy determination, etc.) are essentially within the control of the State agency.

Normally the rule in Federal Court is not to dismiss a complaint simply for failure to name an indispensable party but rather to allow the

pleadings to be amended to include or to join that particular party. But in this particular case, we find a collection of misjoined party plaintiffs (who in fact should not be plaintiffs) commencing an action based on general conclusionary statements without any specific allegations of wrongdoing against the wrong party defendants. This hodgepodge of purported plaintiffs and defendants and issues is so confusing as to be impossible to intelligently try or prove any uniform cause of action. Rules 20 and 23 of the Federal Rules of Procedure specifically prohibit such a collection of issues and individuals simply to gain admittance to Federal Court. Smith v. N. A. Rockwell Corp. - Tulsa Division, 50 F.R.D. 515 (1970); Eisen v. Carlise and Jacqueline, 417 U.S. 156.

Rule 12D when taken with Rule 56 clearly shows that where the complaint fails to allege essential elements and parties for a Federal claim, it must be dismissed. Cook and Nichols Inc. v. Plinsoll, 451 F. 2d 505.

If this Court fails to affirm the dismissal of this complaint by Judge Burke, then Rule 56 of the Federal Rules of Procedure, along with the other Federal rules and requirements for a complaint have no meaning and the express legislative intent of the Congress will have been successfully underminded by judicial interference.

#### POINT V

FAILURE TO DISMISS THIS DEFECTIVE COMPLAINT AND CAUSE OF ACTION INJURES THE NAMED DEFENDANTS IRREPARABLY WITH NO MEANS OF RELIEF.

The defendants in this proceeding have expended hundreds of hours of literally dozens of different technical and professional persons' time and efforts attempting by all human methods to comply with whatever complaints the plaintiffs, EEOC or the Courts have made on them. After three years of exhaustive attempts to satisfy all parties, this suit continues unimpeded, like a giantjuggernaut with a force all its own that costs the taxpayers of Monroe County thousands of dollars and belies the express intent and spirit of the Civil Rights legislation which it attempts to hide behind. The clear Congressional intent of passing all the Civil Rights legislation and Constitutional amendments quoted heretofore was the eradication and elimination of discrimination against an individual simply because of his race, sex, creed or color. It most certainly was not intended as a windfall for greedy individuals who with the minimum of effort can exact a disproportionate cost against named party defendants who, even if vindicated on all counts and in every way, would have great difficulty in recovering the monetary damages and losses occasioned by such a sham suit. Thus for the party defendants in this case their injuries are the direct costs and damages occasioned by the defense of this sham suit as well as the speculative damages and injured reputations of the named defendants in the community, and their relations with both minority and majority employees and the general public at large and the intangible injuries of morale and goodwill, which damages though asserted as a counterclaim could never really make the defendants whole, if indeed any Federal Court would allow any recompence despite the defendants'

success.

The defendants in this proceeding are clearly disadvantaged in view of the disproportionate judicial and administrative leverage that any individual, sham plaintiff or not, can exert through the Civil Rights legislation and the extreme vulnerability of the party defendants to more subtle Federal pressure regardless of the merit of any particular lawsuit, which thus makes these defendants a prime target for judicial blackmail. The Courts cannot in good conscience allow this to go on.

#### CONCLUSION

For the foregoing reasons the defendant-appellees request this

Court affirm the decision and order of the lower Court in dismissing plaintiffs'

complaint and causes of action under the appropriate statutes and for the

appropriate reasons.

Dated: September 10, 1976.

Respectfully submitted,

WILLIAM J. STEVENS
Attorney for Defendants
JOSEPH C. PILATO, of Counsel
Office and P. O. Address
307 County Office Building
Rochester, New York 14614
Telephone: (716) 428-5280

#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of DefendantAppellees was served on the plaintiffs by my causing two copies
thereof to be mailed to the attorney for the plaintiffs, Emmelyn
Logan-Baldwin, Esq., 510 Powers Building, Rochester, New York
14614, this 14th day of September, 1976.

WILLIAM J. STEVENS

Attorney for Defendants
JOSEPH C. PILATO, of Counsel
Office and P. O. Address

307 County Office Building Rochester, New York 14614 Telephone: (716) 428-5280

September 14, 1976 Rochester, New York Exx. A

At a Special Term of the Supreme Court of the State of New York held in and for the County of Monroe at the Hall of Justice on the 25th day of November, 1975

PRESENT:

THE HONORABLE WILMER J. PATLOW,
Justice

SUPREME COURT STATE OF NEW YORK

COUNTY OF MONROE

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Motion having been made by the complainants by notice dated November 12, 1975 for an order to compel discovery pursuant to a Notice of Discovery and Inspection dated September 29, 1975 and to enforce subpoenas duces tecum dated September 30, 1975, both served in connection with proceedings pending before the New York State Division of Human Rights and the respondents having cross moved for an order of protection, for dismissal of complainants' motion and/or denial of complainants' motion and said motion and cross-motions having duly come on for hearing before the court on November 25, 1975, after rescheduling of

date of hearing by consent of all attorneys, and the complainants having appeared by and through their attorney, Emmelyn Logan-Baldwin, in support of their motions and in opposition to respondents' cross-motions, and the respondents having appeared by and through their attorneys, Joseph Pilato and Charles G. Finch, in support of their cross-motions and in opposition to complainants' motions, and the court having read and considered complainants' Notice of Motion to Compel Discovery and to Enforce Subpoenas Duces Tecum dated November 12, 1975 and attached papers, respondents' Cross-Motions for Protective Order and for Dismissal dated November 17, 1975 and November 17, 1975 and complainants' Supplemental Affirmation in Support of Motion to Compel Discovery and to Enforce Subpoenas Duces Tecum dated November 21, 1975 and the court having heard argument from counsel for complainants and respondents and considered the authority submitted by complainants' attorney, and the court having found that all documents required to be produced by the Notice of Discovery and Inspection and by the Subpoenas Duces Tecum are relevant as a matter of law in an employment discrimination case and must be produced, and after due deliberation, it is

ORDERED that complainants' motion to compel discovery and to enforce subpoenss duces tecum is in all respects granted, and it is

FURTHER ORDERED that respondents' motions for protective orders, for dismissal and/or denial of complainants' motions are in all respects denied, and it is

FURTHER ORDERED that respondents shall produce and/or make available the documents listed in the Notice of Discovery and Inspection dated September 29, 1975 and in the subpoenas duces tecum dated September 30, 1975 at the offices of complainants' attorney, Emmelyn Logan-Baldwin, 510 Powers Building, Rochester, New York within 90 days of the entry and service of a copy of this order on the attorneys for the respondents, and it is

respondents might hereafter make that a particular document is non-existent, such document shall remain under and subject to production with complainants, by their attorney, having the right to question the agent of the respondents, by direct and/or cross examination at the public hearing before the New York State Division of Human Rights as to all facts and circumstances of the claim of non-existence.

Wilmer J. Patlow

Justice of the Supreme Court

December // 1975 Rochester, New York

Enter

EXA B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1 WEST GENESEE STREET

BUFFALO, NEW YORK 14202

(716) 842 - 5170



June 4, 1976

Joseph C. Pilato
Deputy County Attorney
County of Monroe
Department of Law
307 County Office Building
Rochester, New York 14614

Dear Mr. Pilato:

In accord with our conversation today, I am writing to confirm that Respondents do have access rights to information in our case files pursuant to §83 of the EEOC Compliance Manual (Attachment A). The procedure for making a request to see the files or obtain copies of items in the files are set out in 29 C.F.R. §1610.1 et seq. (Attachment B).

Sincerely yours,

Kenneth M. Davidson District Counsel

Enclosures

KMD/bow

attachment A

#### SECTION 83

#### DISCLOSURE OF INFORMATION IN CASE FILES

83.1 General - Section 709(e) of Title VII makes it unlawful for any employee of the Commission to make public information obtained by the Commission pursuant to its general authority to investigate charges of discrimination prior to the institution of any proceeding under Title VII. The Fifth Circuit Court of Appeals has held (Kessler v. EEOC 472 F. 2d 1147 (5th Cir. 1973) that granting access to such information to charging parties or their attorneys prior to the institution of a proceeding under Title VII is not "making public" within the meaning of that term as used in section 709(e).

#### 83.2 Exceptions

- (a) Disclosure of Information in Response to Subpoenas, Demands or Order of Courts or Other Authorities The procedures and policies of this section do not apply to disclosures of information from case files in response to subpoenas, demands or orders of courts or other authorities. The procedures in sub part B of the Commission's Regulations on Availability of Records (29 CFR 1610.30 through 1610.36) are to be followed in these circumstances.
- (b) <u>Disclosure of Information When the Commission is a Party to Litigation</u> Once a case file has been referred to Office of General Counsel to be used in litigation to which the Commission is a party or in any other case where the Commission is a party to litigation, the Office of General Counsel will control disclosures of information and all persons requesting disclosure from District Offices or National Programs Division (NPD) will be referred to the Office of General Counsel as provided in section 1610.34 of the Commission Regulations.
- (c) <u>Disclosures of Information in Case Files to Representatives of Interested Federal, State or Local Authorities</u> The procedures and policies of this section do not apply to disclosures of information in case files to representatives of interested Federal, State or local agencies. Such disclosures are to be made as appropriate and necessary to carrying out the Commission's responsibilities under the law in accordance with section 709(b) of Title VII and section 1601.20 of the Commission's Procedural Regulations.
- 83.3 <u>Conditions Precedent to Disclosure</u> Information is case files may be disclosed on request to the persons indicated in 83.5 under the following conditions:
- (a) In connection with Pending or Contemplated Litigation Information in case files may be disclosed provided that the request is made for the purpose of reviewing information in the case file in connection with pending or contemplated litigation. Access to the information will not be granted prior to the expiration of the 180 day period prescribed at section 706(f)(1) of Title VII except when the charge has been dismissed or the aggrieved or charging party demonstrates a compelling need for access prior to the expiration of the 180 day period; and

- (b) Persons Requesting Disclosure Must Agree not to Make the Information Public Information in case files may be disclosed only on the condition that the persons requesting disclosure agree in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII.
- S3.4 Use of EEOC Form 167, Agreement of Nondisclosure (See Exhibit 83-A) Each person to whom disclosure is made will sign a separate EEOC Form 167, Agreement of Nondisclosure, check the appropriate block to indicate identification and provide a complete address and telephone number. Completion of EEOC Form 167 will be accepted as evidence that the conditions in 33.3 are agreed to by the person requesting disclosure. The Commission representative who signs the EEOC Form 167 on behalf of the Commission will normally be the District Counsel, District Director or other responsible professional employee in a supervisory position. Retain the original in the case file. A copy may be provided to the person requesting disclosure, if requested.
- 83.5 Persons to Whom Information in Case Files May be Disclosed Information in case files may be disclosed on request, after complying with the expunction requirements discussed in 83.6, to only the following persons:
- (a) Charging Parties and their attorneys (except as otherwise provided in 83.5(c) below):
- (b) Aggrieved persons in case files involving Commissioner Charges and their attorneys provided that such persons have been notified of their status as aggrieved persons pursuant to section 1601.25 (c) of the Commission's Procedural Regulations;
- (c) Persons or organizations filing on behalf of an aggrieved person, provided that the aggrieved person has given written authorization to the person who filed on his or her behalf to act as the aggrieved person's agent for this purpose and their attorneys;
- (d) Employees of Commission funded groups such as the Mexican-American Legal Defense and Education Fund and Lawyer's Committee for Civil Rights Under Law for the purpose of reviewing information in case files to determine the appropriateness of referral to private attorneys as a service to charging parties, provided that the conditions in 83.4 and 83.6 have been met and that the Commission funded group is reviewing the information at the request of the charging party;
- (e) Respondents and their attorneys, provided that the charging party or aggrieved person has filed suit under Title VII; and

(f) Any party in a class action complaint, provided that such party is actually named in the complaint as filed in Federal district court or is actually named by court order as a class member.

# 83.6 Expunction of Confidential Material from Case Files Prior to Disclosure

- (a) <u>Ceneral</u> Expunction of confidential material pursuant to this section will be strictly supervised by the District Counsel or Attorney Advisor in NPD, the District Director, Chief, NPD, or other responsible professional employee in the absence or non-availability of an attorney or the District Director. Supervision of expunction will not be further sub-delegated to non-professionals.
- Remove any information concerning the identities of and statements by witnesses who have been promised anonymity by a Commission representative during the course of investigation or conciliation. The statements of such witnesses are to be clearly marked by the Commission representative who promised anonymity by placing the words "Confidential Witness Do not Disclose this Statement" at the top and bottom of each page of each statement. The confidential witness's name is to be followed by the words "Confidential Witness" when used on the index to tabs in the case file. The name is to be obscured and the index photocopied so that only the words "Confidential Witness" appears on the index provided to persons requesting disclosure. A similar procedure is to be followed each place the confidential witness's name or information obtained from the witness appears in the case file.
- (c) Review Sheet on Commission Decisions Remove the review sheet covering Commission Decisions before disclosure because this review sheet records information concerning intra-governmental advisory and deliberative communications.
- (d) Intra-Agency and Inter-Agency Memoranda Remove the Investigator's Memorandum. Remove all memoranda, notes and other documents prepared by Commission attorneys or received from other governmental agencies which contain recommendations or mental impressions as to strategy for settling the case or litigation. Remove all memoranda or notes from Regional Litigation Offices, from Office of General Counsel and from the Department of Justice.
- (e) Any Data on Other Respondents Remove all data naming other respondents which may be contained in the case file. The names of other respondents usually will be contained on EEOC Form 155, Pre-Investigation Charge Analysis, if charging party has filed charges against other respondents or on deferral correspondence which sometimes includes lists of charges deferred. The names of other respondents is to be obscured from such documents before disclosure.
- (f) Conciliation Materials All information in case files concerning the Commission's attempts to settle the charge by the informal methods of conference, conciliation and persuasion will be removed. The material to be removed includes: EEOC Form 134, Conciliation Case Analysis; material to be removed includes: EEOC Form 156, Final Conciliation

Summary; EEOC Form 180, Conciliation Benefits; Commission and respondent proposals and counter proposals; and all correspondence and any other information in the case file similar to that customarily contained in the items cited. EEOC Form 153, Invitation to Participate in Settlement Discussion, will be disclosed.

#### 83.7 Scope of Disclosure Permitted

- (a) Employer Information Reports (EEO-1) or Other Reports
  Prescribed by the Commission Pursuant to Section 709(c) All reports
  required by the Commission from respondents covered by Title VII such as
  Employer Information Report (EEO-1), State and Local Government Information Report (EEO-4) will be disclosed if available in the District Office
  or National Programs Division notwithstanding the fact that these reports
  were not actually in the charging party's case file.
- (b) Information in Case Files Obtained from OFCC or Contract Compliance Agencies Under the EEOC/OFCC Memorandum of Understanding Paragraph 5 of the Memorandum of Understanding between EEOC and OFCC signed September 11, 1974 provides as follows:

"All requests by third parties for disclosure of information shall be referred to the agency which initially compiled or collected the information".

Information obtained from a contract compliance agency or OFCC pursuant to this agreement will be disclosed only to those persons entitled to disclosure under 83.5 and subject to the conditions in 83.3 and 83.4. Requests for this information from persons other than those in 83.5 should be referred to the agency which initially compiled or collected the information in accordance with section 1610.6 of the Commission's Regulations and EEOC Order 151 entitled: Disclosure of Information Under the Freedom of Information Act (but also see 83.2(c)).

# (c) Other Case Files Involving the Same Respondent

- (1) <u>General</u> The Commission's policy is to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent which are available in the same District Office or National Programs Division, provided that the information in the other case files is relevant or material to the private litigant's case.
- (2) Determining When Information in Other Case Files is Relevant or Material Information in other case files is relevant or material when other case files contain charges, investigations or determinations involving the same basis (e.g. sex, religion, national origin, race) with limited exceptions such as when the private litigant's case alleged discrimination in promotion against females and the other case file involved a male's claim that he was not hired because of respondent's policy of not hiring long haired males. Other case files

may be relevant or material if they involve a different basis only when the treatment afforded one protected class is probative of treatment afforded the private litigant's class (e.g. systemic discrimination against Spanish Surnamed Americans is often probative as to treatment accorded blacks and vice versa).

- (3) Safeguard the Identity of Person on Whose Behalf Charge was Made When Disclosing Other Case Files Involving the Same Respondent -Section 1601.6 of the Commission's Procedural Regulations provides that the Commission shall safeguard and keep confidential the name and address of any person on whose behalf a charge is made. When disclosing information in other case files involving the same respondent, remove any material which would reveal the name or address of any person on whose behalf a charge was made including EEOC Form 151, Third Party Certification of Charge, (or any other document serving the same purpose), the affidavit required by 2.3 (f) in which the person on whose behalf a charge is made acknowledges aggrievement or any other documents which contain the name or address of the person on whose behalf a charge was made. When constructing the case file, a procedure similar to that described in 83.6(b) is to be followed, i.e. clearly mark the index tabs in the case file and mark each document which contains information which the Commission is required to safeguard pursuant to section 1601.6 of the Commission's Procedural Regulations.
- (4) District Director or Chief, NPD, Decision as to Relevant or Material is final Because the policy of allowing access to information in other case files is discretionary on the part of the Commission the decision of the District Director or Chief, NPD, is final when made and may not be appealed. However, any District Director or Chief, NPD may reconsider on his or her own motion any decision made as to relevancy.
- 83.8 Collection and Disposition of Fees for Copying Fees for photocopying will be assessed or waived in accordance with the schedule of fees contained at sections 1610.15 of the Commission's Regulations. Collections and disposition of fees will be in accordance with EEOC Order 471. Persons granted access to information in case files will not normally be permitted to remove case files from Commission premises except that the District Director or Chief, NPD, may allow a file to be copied away from Commission premises if unusual circumstance warrant and proper safeguards are observed to prevent loss or mutilation of the file. District Office or National Programs Division personnel will photocopy materials on request; however, if a request for photocopying involves unusual problems of reproduction or handling, District Director or Chief, NPD may require persons requesting copies to make special arrangements. Persons granted access are to be encouraged to minimize the amount of photocopying by Commission employees by first carefully inspecting the information in the case file and making a judicious selection of the materials to be photocopied.
- 83.9 Copy of this Section may be Provided to Persons who Sign EEOC Form 167 A photocopy of this section will be provided to persons who sign an EEOC Form 167 at no cost.

# SUBPART A—PRODUCTION OR DISCLOSURE UNDER 5 U. S. C. 552(a)

[¶ 4110.01]

§ 1610.1 Definitions.

(a) "Title VII" refers to Title VII of the Civil Rights Act of 1964, as amended by Pub. L. 92-261, 42 U.S.C. (Supp. II) 2000e et seq.

(b) "Commission" refers to the Equal Employment Opportunity Commission.

(c) "Freedom of Information Act" refers to 5 U.S.C. 552 (Pub. L. 90-23 as a mended by Pub. L. 93-502).

[¶ 4110.02]

§ 1610.2 Statutory requirements.

5 U.S.C. 552(a) (3) requires each Agency, upon request for reasonably described records made in accordance with published rules stating the time, place, fees, if any, and procedure to be followed, to make such records promptly available to any person. 5 U.S.C. 552(b) exempts specified classes of records from the public access requirements of 5 U.S.C. 552(a) and permits them to be withheld.

[ ¶ 4110.03 ]

§ 1610.3 Purpose and scope.

This subpart contains the regulations of the Equal Employment Opportunity Commission implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all organizational units within the Commission. Official records of the Commission made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. Officers and employees of the Commmission may continue to furnish to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to the enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties. To the extent that it is not prohibited by other laws, the Commission also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

9 4110.01

[[ 4110.04]

§ 1610.4 Public reference facilities and

(a) The Commission will maintain in a public reading area located in the Commission's library at 2401 E Street NW., Washington, D.C. 20506, the materials which are required by 5 U.S.C. 552(a) (2) and 552(a) (5) to be made available for public inspection and copying. The Commission will maintain and make available for public inspection and copying in this public reading area a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is required to be indexed by 5 U.S.C. 552(a) (2). The Commission in its discretion may, however, include precedential materials issued, adopted, or promulgated prior to July 4, 1967. The Commission will also maintain on file in this public reading area all material published by the Commission in the FEDERAL REGISTER and currently in

(b) Each district office listed in paragraph (c) shall maintain a public reading room or area which shall contain a

copy of:

(1) The Commission's notices and regulatory amendments which are not yet or have never been published in the Code of Federal Regulations,

(2) The Commission's annual reports,

(3) The Commission's Compliance Manual,

(4) Blank forms relating to the Commission's procedures as they affect the public.

(5) The Commission's Orders (agency directives), and

(6) "CCH Equal Employment Opportunity Commission Decisions" (1973) and Employment Practices Guide (vol. 1), both published by Commerce Clearing House, Inc.

(c) The Commission's District Offices

 Atlanta District Office, Citizens' Trust Building, 10th Floor, 75 Fiedmont Avenue, NE. Atlanta, Georgia 30303.

 Birmingham District Office. 2121—3th Avenue, North, Boom 324, Birmingham, Alabama 35203.

3. Charlotte District Officee, 411 North Tryon Street, 2nd Floor, Charlotte, North Carolina 28202.

 Jackson District Office, 203 West Capitol Street, 2nd Floor, Jackson, Mississippi

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39201.

5. Memphis District Office, The Dermon Building, Suite 1004, 46 North Third Street, Memphis, Tennessee 38103.

6. Miami District Office, Biscayne Terrace Hotel, 10th Floor, 340 Biscayne Boule-vard, Miami, Florida 33132.

7. Chicago District Office, Federal Building, Room 234, 536 South Clark Street, Chicago, Illinois 60605.

8. Cincinnati District Office, Pederal Building, Room 8525, 550 Main Street, Cincinnati, Ohio 45202.

9. Cleveland District Office, Engineers' Building, Room 402, 1365 Ontario Street, Cleveland, Ohio 44114.

10. Detroit District Office, Michigan Build-

ing, Suite 600, 220 Bagley Avenue, Detroit, Michigan 48226.

11. Indianapolis District Office, Federal Building, U.S. Courthouse, 46 East Ohio Street, Room 458, Indianapolis, Indiana 46204.

12. Milwaukee District Office, Veterans Administration Building, 342 North Water Street, 6th Floor, Milwaukee, Wisconsin 53202.

buquerque District Office, National Building, Suite 1717, 505 Marquette Avenue, N.W., Albuquerque, New 13. Albuquerque Mexico 87101.

14. Dallas District Office, 400-A Lancaster-Keist Shopping Center, Suite 10, Dal-las, Texas 75216.

15. Houston District Office, Pederal Building. Room 1101, 2320 La Branch, Houston, Texas 77004.

16. New Orleans District Office, Masonic Temple Building, Room 1711, 333 St. Charles Avenue, New Orleans, Louistana 70230.

17. San Antonio District Office, 301 Broadway, Suite 200, San Antonio, Texas 78205

18. Kansas City District Office, 911 Walnut Street, Room 500, Kansas City, Missouri 64106.

19. St. Louis District Office, Locust Building. Room 917, 1015 Locust Street, St. Louis, Missouri 63101.

20. Boston District Office, 150 Causeway Street, Boston, Massachusetts 02114.

21. Ruffalo District Office, One West Genesee Street, Room 1020, Buffalo, New York 14202.

 New York District Office, 90 Church Street, 13th Floor, New York, New York 10007.

23. Newark District Office, 9 Clinton Street,

3rd Floor, Newark, New Jersey 07102. 24. Baltimore District Office, The Rotunda. Room 201, 711 West 40th Street, Baltimore, Maryland 21211.

25. Philadelphia District Office, 219 North Broad Street, 2nd Floor, Philadelphia, Pennsylvania 19107

26. Pittsburgh District Office, Federal Building. Room 2038A, 1000 Liberty Avenue. Pittsburgh, Pennsylvania 15222.

27. Washington District Office, 1717 H Street, N.W., Suite 400, Washington, D.C. 20006. 28. Denver District Office, Ross Building, 6th Floor, 1726 Champa Street, Denver,

Colorado 80202. Los Angeles District Office, 1543 West Olympic Boulevard, Suite 340, Los An-

**Employment Practices** 

geles, California 90015.

30. Phoenix District Office, Greater Arizona Savings Building, 112 North Central Avenue, Suite 601, Phoenix, Arizona 85004

31. San Francisco District Office, 1095 Market Street, Room 701, San Francisco, Callfornia 94103.

32. Seattle District Office, Time Square Building, 4th Floor, 414 Olive Way, Seattle, Washington 98101.

[¶ 4110.05]

#### § 1610.5 Request for records.

(a) A written request for inspection or copying of a record of the Commission may be presented in person or by mail to the Commission employee designated in § 1610.7. Requests must be presented during business hours on any workday.

(b) Each request must contain information which reasonably describes the records sought and, when known, should contain a name, date, subject matter and location for the record requested in order to permit the record to be promptly located.

(c) Where a request is not considered reasonably descriptive or requires the production of voluminous records, or necessitates the utilization of a considerable number of work hours to the detriment of the business of the Commission, the Commission may require the person making the request or such person's agent to confer with a Commission representative in order to attempt to verify the scope of the request and; if possible, narrow such request.

(d) When a requested record has been identified and is available, the person who made the request will be notified (1) when and where the record will be made available and (2) the cost assessed for processing the request. Fees for the processing of requests will be made in accordance with the schedule set forth in § 1610.15. Checks shall be made payable to the Treasurer of the United States.

[ 17 4110.06 ]

§ 1610.6 Records of other aguncies.

Request for records that originated in another Agency and are in the custody of the Commission, will be referred to that Agency for processing, and the person submitting the request shall be so notified. The decision made by that Agency with respect to such records will be honored by the Commission.

1 4110.08

[¶ 4110.07]

§ 1610.7 Where to make request; form.

(a) A request for any material in a district reading room or area as set forth by § 1610.4(b) or a request for existing statistical data, which is not confidential, relating to the case processing of the district office shall be submitted to the district director in charge of such reading room or area at the appropriate address listed in § 1610.4(c).

(b) A district director is authorized to grant a request as to those matters described in paragraph (a). A district director, when granting a request, will do so within 10 working days of its receipt. A district director is not authorized to deny a request, but shall, if he or she believes that good reason exists for not disclosing the data requested, immediately refer the matter to the General Counsel.

(c) A request for any record which is not available under paragraph (a) shall be submitted in writing to the General Counsel, Equal Employment Opportunity Commission, 2401 E Street, NW., Washington, D.C. 20508.

(d) A request must be clearly and prominently identified as a request for information under the Freedom of Information Act. If submitted by mail or otherwise submitted under any cover, the envelope or other cover must be similarly identified.

(e) When a request is one which by nature should properly be directed to the General Counsel, such request shall not be deemed to have been received by the Commission until the time it is actually received by the General Counsel.

(f) Any Commission cificial who receives a written Freedom of Information request, unless it be a district director who fills the request, shall promptly forward it to the General Counsel. Any Commission official who receives an oral request under the Freedom of Information Act shall inform the person making the request that it must be in writing and also inform such person of the provisions of this subpart.

[ 4 4110.08 ]

§ 1610.3 Authority to determine.

The General Counsel, when receiving a request pursuant to these regulations, shall grant or deny each such request.

9 4110.07

The decision of the General Counsel shall be final, subject only to administrative review as provided in § 1610.11 of this subpart.

[¶ 4110.09]

§ 1610.9 Prompt response.

(a) The General Counsel shall either grant or deny a request for records within 10 working days after receipt of the request unless additional time is required for one of the following reasons:

(1) It is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) It is necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) It is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(b) When additional time is required for one of the reasons stated in paragraph (a), the General Counsel or his designee shall acknowledge receipt of the request within the 10-day period and include a brief notation of the reason for the delay and an indication of the date on which it is expected that a determination as to disclosure will be forthcoming. An extended deadline adopted for one of the reasons set forth above may not exceed 10 additional working days.

[ ¶ 4110.10 ]

§ 1610.10 Responses: form and con-

(a) When a requested record has been identified and is available, the General Counsel shall notify the person making the request as to where and when the record is available for inspection or that copies will be available. The notification shall also advise the person making the request of any assessed fees under § 1610.15 hereof.

(b) A reply denying a written request for a record shall be in writing signed by the General Counsel and shall include:

(1) His name and title:

(i) A reference to the specific exemp-

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tion under the Freedom of Information Act authorizing the withholding of the record, to the extent consistent with the purpose of the exemption, and a brief explanation of how the exemption applies to the record withheld or (ii) a statement that, after diligent effort, existing requested records have not been found or have not been adequately examined during the time allowed under § 1610.9(a), and that the denial will be reconsidered as soon as the search or examination is complete; (iii) a statement that the denial may be appealed to the Commission within 30 days of receipt of the denial or partial denial.

(c) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the person making

the request shall be so notified.

#### [ 4110.11]

§ 1610.11 Appeals to the Commission from initial denials.

(a) When the General Counsel has denled a request for records in whole or in part, the person making the request may, within 30 days of its receipt, appeal the denial to the Commission. The appeal must be in writing addressed to the Chairman, 2401 E Street, NW., Washington, D.C. 20506 and clearly labeled as a Freedom of Information Act appeal.

(b) The Commission will act upon the appeal within 20 working days of its receipt, and more rapidly if practicable. If the decision is in favor of the person making the request, the decision shall order records promptly made available to the person making the request. The Commission may extend the 20 day period in which to render an appeal for that period of time which could have been claimed and consumed by the General Counsel under § 1610.9 but which was either not claimed or consumed in making the initial determination.

(c) The Commission's action on an appeal shall be in writing signed by the Chairman of the Commission. A denial in whole or in part of a request on appeal shall set forth the exemption relied on, a brief explanation of how the exemption, applies to the records withheld and the reasons for asserting it, if different from that described by the General Counsel under § 1610.10, and that the person making the request may, if dissatisfied with the decision on appeal, file a civil action in the district in which the person resides or has his principal place of business, in the district where the records reside, or in the District of Columbia.

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(d) No personal appearance, oral argument or hearing will ordinarily be permitted in connection with an appeal to the Commission.

(e) On appeal, the Commission may reduce any fees previously assessed.

#### [¶ 4110.13]

§ 1610.13 Maintenance of files.

(a) The General Counsel shall maintain files containing all material required to be retained by or furnished to him under this subpart. The material shall be filed by individual request, indexed according to the exemptions asserted, and, to the extent feasible, indexed according to the type of records requested.

(b) The General Counsel shall also maintain a file open to the public, which shall contain copies of all grants or denials of appeals by the Commission. The material shall be indexed as stated in

paragraph (a).

#### Г ¶ 4110.14 ]

§ 1610.14 Waiver of user charges.

(a) Except as previded in paragraph (b) the General Counsel shall assess fees for the search and, if necessary, duplication of records requested. He shall also have authority to furnish documents without charge, or at a reduced charge, where he determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(b) District directors are hereby authorized to collect fees for duplication of records which are available in the district office reading rooms or otherwise made available at the district office. District directors are hereby authorized to duplicate such records without charge, or at a reduced charge in accordance with the

criteria of paragraph (a).

#### 「¶ 4110.15]

§ 1610.15 Schedule of fees and nethod of payment for services rendered.

(a) Except as otherwise provided, the following specific fees shall be applicable with respect to services rendered to members of the public under this subpart:

fraction thereof \$3.60
(2) Other facilitative services and index assistance minimum charge \$3.89

1 4110.15

(3)	Copies made by Xerox or otherwise (per page) (maximum of 10	
	copies)	.03
	Attestation of each record as a	.75
	Certification of each record as a true copy, under the seal of the agency	1.00
(6)	For each signed statement of neg- ative result of search for record.	1 00

(b) While the fees charged for services and copying will in no event exceed those as specified in paragraph (a), the Commission reserves the right to limit the number of copies that will be provided of any document or to require that special arrangements for copying be made in the case of records or requests presenting unusual problems of reproduction or handling.

[[4110.16]

### § 1610.16 Payment of fees.

(a) Unless a person making a request under the Freedom of Information Act states that he or she will bear all assessed fees levied by the Commission in searching for and, where applicable, reproducing frequested data, said person will be held liable for assessed fees not to exceed \$50.00. A request which the Commission expects to exceed \$50.00 and which does not state acceptance of responsibility for all assessed fees will not be deemed to have been received until the person making the request is promptly advised of the anticipated fees and agrees to bear them.

(b) A search fee will be assessable notwithstanding that no records responsive to the request or that no records not exempt from disclosure are found.

(c) Fees must be paid in full prior to issuance of requested copies of records. The Commission will inform the person making the request of the exact amount of the assessed fees at the time of granting or denying the request.

TT 4110.17]

#### § 1610.17 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in 552(b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes. in-

9 4110.15

formation given in confidence, and matters involving personal privacy.

(b) Section 706(b) of Title VII provides that the Commission shall not make public charges which have been filed. It also provides that (subsequent to the filing of a charge, an investigation, and a finding that there is reasonable cause to believe that the charge is true) nothing said or done during and as a part of the Commission's endeavors to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion may be made public by the Commission without the written consent of the parties concerned; nor may it be used as evidence in a subsequent proceeding. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of section 706(b) shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not

more than 1 year. (c) Section 709 of Title VII authorizes the Commission to conduct investigations of charges filed under § 706, engage in cooperative efforts with State and local agencies charged with the administration of State or local fair employment practices laws, and issue regulations concerning reports and record-keeping. Section (e) of section 709 provides that it shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under section 709 prior to the institution of any proceeding under the Act involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of section 709(e) shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than 1 year.

(d) Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

(e) Each executed statistical reporting form required under Part 1602 of this Chapter, such as Employer Information Report EEO-1, etc., relating to a particular employer is exempt from disclosure to the public prior to the institution of a proceeding under Title VII involving information from such form.

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# EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1 WEST GENESEE STREET BUFFALO, NEW YORK 14202 (716) 842 - 5170

July 15, 1975

LaMarr J. Jackson . Affirmative Action Coordinator County of Monroe 209 County Office Building 39 Main Street West Rochester, NY

Re: Irvin Gill, etal. vs. Monroe County Department of Social Services & Monroe County Civil Service Commission Charge No. TBU4 0056

Dear Ms. Jackson:

Following the last conciliation conference on May 30, 1975 with the Respondents, discussions have been held with the Charging Parties' attorney, Emmelyn Logan-Baldwin of Rochester, New York.

The attorney has advised the Commission that the Conciliation Proposal is unacceptable and has requested the Right-to-Sue Notice from the United States Department of Justice.

Eventhough it is no longer possible to conciliate the individual issues, the Commission can proceed with the class issues which cover the recruitment, hiring, promotion, training and affirmative action, as proposed. Please advise me as to the position of the Respondents and the Monroe County Manager, Lucien Morin, in continuing conciliation to resolve these issues.

Very truly yours, Enne S. Slock

Erna S. Clark

Conciliator

GA-302-125-71

#### COUNTY OF MONROE

# INTERDEPARTMENTAL CORRESPONDENCE

To: Liz Petty, Social Services - Staff Development

FROM: Ron Beckwith, Civil Service Personnel

DATE: July 25, 1974

SUBJECT: Information requested from your memorandum dated July 18, 1974.

Please find attached information you requested on the Civil Service examination history of the employees within your department.

If I can assist you further, please do not hesitate to contact me.

RB/d Enclosure

JUL 29 1974

# Linda Gaffney

Supervising Examiner

No record of ever applying No record of ever applying

# Evelyn Fairwell

Examiner Trainee

No record of ever applying No record of ever applying

# Rovella Floyd

Supervising Examiner Certification Supervisor No record of ever applying No record of ever applying

#### Inez Page

Examiner Trainee

No record of ever applying

# Annie Hicks

Senior Caseworker

P-7369 est. 4-15-66 Failed P-99204 est. 5-9-68 Failed

P-71853 est. 5-7-70 Filed-rejected due

to resignation before exam

Supervising Examiner Certification Supervisor P-74533 est. 12-23-71 Failed No record of ever applying No record of ever applying

#### Doretha Diggs

Examiner Trainee
Examiner

No record of ever applying No record of ever applying

# Harriet Weathers

Examiner Trainee
Examiner

No record of ever applying No record of ever applying

# Selma Matthews

Examiner Trainee, Examiner

No record of ever applying No record of ever applying

# Marie Fitzhugh

Meninistrative Caseworker

Casework Coordinator Staff Development Coordinator Certification Supervisor Certification Coordinator

Katherine Harris

Supervising Examiner Certification Supervisor

Michelle Cournoyer

Resigned

Irvin Gill

Casework Coordinator
Certification Coordinator
Certification Supervisor
Certificative Caseworker
Caff Development Coordinator

Dorothy Dobson

Senior Caseworker

Supervising Examiner Certification Supervisor

Grace Rutherford

Senior Caseworker

Supervising Examiner Certification Supervisor

Vivian Silas

Examiner Trainee

Dorothy Latham

Examiner Trainee Examiner

P-75982 est. 1-4-73 73.6 11th place on list

Presently 7th on list
No record of examination
No record of examination
No record of ever applying
No record of ever applying

No record of ever applying No record of ever applying

No record of ever applying
P-77201 est. 9-26-73 Did Not Appear
P-77202 est. 9-25-73 Did Not Appear
No record of ever applying
No record of examination

P-7369 est. 4-15-66 Failed P-99204 est. 5-9-68 Failed P-71853 est. 5-7-70 Failed P-74533 est. 12-23-71 Failed No record of ever applying No record of ever applying

P-71853 est. 5-7-70 Failed P-74533 est. 12-23-71 Failed No record of ever applying No record of ever applying

No record of ever applying No record of ever applying

No record of ever applying No record of ever applying

# Carolyn Taylor

Supervising Examiner

No record of ever applying No record of ever applying

# Inez Charles

Senior Caseworker

Supervising Examiner Certification Supervisor

# Charles Campbell

Senior Caseworker Certification Supervisor Supervising Examiner Casework Supervisor

# ty Jo Travis

Clerk Grade 2

#### Rosie Robinson Senior Examiner

# Alice Zealy

Senior Examiner Senior Caseworker

Supervising Examiner

P-99204	est.	5-9-68	Failed
P-71853		5-7-70	Failed
P-74533	est.	12-23-71	Failed
P-77200	est.	9-21-73	Failed
No record	of e	ver apply.	ing

No record of ever applying
No record of ever applying
No record of ever applying
P-25-69 est. 10-15-69 Failed
P-23-70 est. 7-22-70 Failed
OC-1-73 est. 3-9-72 Failed
OC-62746 est. 1-4-73 Failed

No record of ever applying

No record of ever applying

No record of ever applying P-99204 est. 5-9-68 Failed P-71353 est. 5-7-70 Failed P-74533 est. 12-23-71 Failed No record of ever applying costs and motion denied in accordance with the following Memorandum: Appellants appeal from an order of Special Term which granted complainant's motion to enforce two subpoenas duces tecum issued by the private attorney of complainant Noble and which determined that the complaint, insofar as it charged the preferment of Mr. Hill over complainant, was not barred by the one-year period of limitation (Executive Law, § 297 [5]). 9 Complainant Noble is a perfusionist at Strong Memorial Hospital. She alleges that appellants unlawfully discriminated against her because of her sex by appointing one Aaron Hill to a position which she sought and for which she was qualified, that of Chief Perfusionist. Mr. Hill's appointment was effective January 1, 1974. The complaint filed with the State Division of Human Rights on March 3, 1975 charged that appellants had unlawfully preferred Mr. Hill and had engaged in acts of discrimination towards women employees generally. The Division has not made a finding of probable cause and the matter is still in the investigative stage. 9 The subpoenas are quashed. A private attorney may not issue a subpoena duces tecum during the investigatory stage of discrimination proceedings. 9 There is no statutory provision in the Executive Law for the issuance of subpoenas by private attorneys, although the statute provides that the Division may issue a subpoena at "any stage of any investigation or proceeding before it" and may make rules with respect thereto (Executive Law, § 295 [7]). The Division rules permit private attorneys representing complainants to issue subpoenas as provided in the CPLR (9NYCRR 465.10). In turn, CPLR 2302 provides that an attorney may issue subpoenas in administrative proceedings. This power to issue subpoenas, however, was designed to make evidence available at a hearing on the merits. Before a determination of probable cause, the complainant may be represented by an attorney but the matter is to be investigated by the State Division. Thus, the statute provides for various preliminary procedures designed to promote

amicable settlements (see Executive Law, § 297) and for the dismissal of a complaint "in the unreviewable discretion" of the Division if it finds that th complaint lacks substance. If the Division requires preliminary information obtainable by subpoena, the statute provides it with that authority, but before the hearing stage the Division should be free to work its will without interference by the complainant's private attorney, and the complainant is not permitted to use the subpoena power as a discovery device (see McKinney's Cons Laws of NY, Book 7B, CPLR 2302, David E. Siegel, Practice Commentary). 9 Furthermore, the complaint, insofar as it relates to the Hill promotion, was filed more than one year after the incident and is time-barred. The statutory limitation is integral to the right of relief which the statute created. It is not a matter of defense. Unless the complainant brings the proceeding within the one-year period, she has no cause of action (Matter of Munger v. State Div. of Human Rights, 32 AD2d 502; and see Romano v. Romano, 19 NY2d 444, 447). The wrong is not a continuing one as Special Term held, because the promotion was a single act. Matter of Russell Sage Coll. v. State Div. of Human Rights (45 AD2d 153, affd 36 NY2d 985), relied upon by complainant, is inapposite. In that case complainant, one of tiree professors performing equal duties, received lesser pay than her male colleagues, although she had higher qualifications. Each pay check thus became a further act of discrimination. In this case there was only one alleged act of discrimination, the appointment of Mr. Hill. His higher salary and his continuing employment are the result of that promotion, not the result of any continuing discrimination. The complaint insofar as it charges appellants with unlawful discrimination in the appointment of Mr. Hill is dismissed. (Appeal from Order of Monroe Supreme Court, Boehm, J. -Proceeding pursuant to section 298, Executive Law.) Present: Moule, J.P., Cardamone, Simons, Mahoney, Dillon, JJ.

372. (Monroe Co.) — State Division of Human Rights on complaint of Barbara Noble, Respondent, v. University of Rochester and Strong Memorial Hospital, Appellants. — Order unanimously reversed without

UNITED STATES DISTRICT COUNT WESTERN DISTRICT OF NEW YORK

MERCEDUS CONMALEY, ANA COMMALEY and Julio Brito on behalf of themselves and all other similarly situated,

plaintiffs

- VS -

CIVIL 1973-88

ARE LAVINE individually and in his official capacity as Commissioner of the New York State Department of Social Services, JAMES. REED, individually and in his official capacity as Director of the Monroe County Department of Social Services, the New York State Department of Social Services and State Department of Social Services, the Monroe County Department of Social Services,

Defendants

Marianna Artusio
628 Clinton Avenua Horth
Rochester, N.Y. 14605
Attorney for plaintiffs

Louis J. Leftowitz
Attorney General of New York
Attorney for defendant Lavins
Paul O. Harrison
Assistant Attorney Coneral of New York
65 Broad Street
Fochester, N.Y. 16614
(of counsel) and
Ruth Ressler Toch
Solicitor General (of counsel)

Charles W. Caruana 111 Westfall Road Rochester, M.Y. 14620 Attorney for defendant Road Commissioner of New York State Department of Social Services by motion filed April 20, 1973 moves to dismiss this action on grounds specifically stated in his notice of motion. The defendant Reed individually and as Director of the Montee County Department of Social Services also moves to dismiss the complaint on grounds specifically enumerated in his notice of motion. The motions were finally submitted June 12, 1973 on written briefs.

The complaint sacks to have declared unconstitutional, as in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and to enjoin operation of the New York Codes State Table for Cooperative Budgeting, 18 New York Codes Rules and Regulations, Section 352.2(a)(1), which establishes a schedule of allowands for basic backs of cligible persons in groups with megand to sid to the north blind and disabled under the New York State Social Security Net.

The Table sets a lover per capits allowands where there are proportionately more persons in the family unit or household.

There is no federal-question subject-matter jurisdiction. There is no colorable constitutional issue. The basis of classification under attack is not shown to be unreasonable. Dicen vo. Eastman, 421 F.2d, 560 (2 cir. 1969). Russo vs. Kirby, 453 F.2d, 548, 551 (2 cir. 1972).

The complaint does not allege facts sufficient to state claims upon which melied can be granted. Albany Welfare Rights Organization Day Care Conter Inc. vs. Behacek, 463 F.2d. 620 (2 cir. 1972).

The plaintiffs have not exhausted adequate administrative remedies available under the New York Social Services Law, Section 166, and Regulations therewald and have nover requested hearings available under New York Law, Eisen vs. Eastman, 421 2.28, 560.

The New York State Department of Social Services and the Monroe County Department of Social Services and not persons within the language of the Civil Rights Act.
42 U.S.C. Section 1903.

A single judge does not have jurisdiction to is. the injunction requested. 28 U.S.C. Section 2281.

The complaint is dismissed.
MY NS HURUST SO ORDURED.

TOWNS P. WING

United States District Sudje

UNITED STATES DISTRICT COURT.
SOUTHERN DISTRICT OF NEW YORK

HELEN C. KOSCHERAK, individually and on behalf of all other persons .similarly situated,

Plaintiff,

-against-

RURT R. SCHMELLER, President, Queensborough Community College, and HARRY I. BRONSTEIN, Personnel Director and Chairman, New York Civil Service Commission,

Defendants.

PAUL H. DaSTLVA, PERRY DIXON, JOSEPH DOWLING, et al.,

Plaintiffs,

-against-

THE STATE OF NEW YORK, THE CITY OF .
HEN YORK, NEW YORK CITY DEPARTMENT
OF HOUSING AND DEVELOPMENT
ADMINISTRATION, et al.,

Defendants.

OPINION .

72 Civ. 3185

# 39812

1/1

72 Civ. 3432

11: -

SAMUEL RESNICOFF, ESQ., New York City, Attorney for Plaintiff Helen C. Koscherak.

MURRAY RUDMAN, ESQ., New York City, Attorney for Plaintiffs DaSilva, Dixon, Dowling et al.

LOUIS J. LEFKOWITZ, ESQ., Attorney
General for the State of New York,
by IRVING L. ROLLINS and ARLENE R.
SILVERMAN, Assistant Attorney
Generals.

NORMAN REDLICH, ESQ., Corporation

Counsel for the City of New York,
by FREDERICK H. ARRENS, JR., A.

NICHAEL WERDER and JOHN MACHAGEL,
Assistant Corporation Counsel.

JOHN G. de NOOS, ESQ., General Counsel, New York City Transit Authority, by HELEN R. CASSIDY, JAMES P. McMAHON and JOHN A. MURRAY.

DAVID QUIENT, ESQ., Attorney for Police Department, City of Glen Cove.

OTTO M. BOMAPARTE, ESQ., Attorney for New York City Housing Authority.

For Defendants.

# TYLER, D.J.

Plaintiffs in these consolidated actions fall into two categories: (1) civil servants, employed by agencies of New

York State, Nassau County and New York City, who are seeking promotions; and (2) applicants seeking their first appointments as civil servants. All took and passed competitive examinations offered by the state, county or city civil service commission, and were certified to the public agency defendants as eligible for the positions desired. These agencies, by direct authority of Section 61(1) of the New York State Civil Service Law, or, in the case of county or municipal agencies, by rule adopted thereunder, rejected or passed over plaintiffs and instead appointed or promotes eligibles who had achieved lower examination scores.

Examinations for promotion are labeled "open", N.Y. Civil Service Law §51, those for appointment "competitive", N.Y. Civil Service Daw §52.

<sup>2/ .
\$61</sup> Appointment and Promotion:

<sup>&</sup>quot;1. Appointment or promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion,..."

New York Civil Service Law §21(1) and (2).

Plaintiffs challenge the constitutionality of \$61(1).

They contend that achieving the top scores on the competitive examinations carries with it a claim to or substantial expectation of promotion or appointment. This being so, in cases where the claim or expectation is not realized, it follows that \$61(1) authorizes a deprivation without due process of law.

Plaintiffs also argue that even in the absence of a substantive right to promotion or appointment, those directly affected by civil service personnel decisions can demand that a given agency not act arbitrarily or capriciously, nor apply criteria such as race, religion or sex; since \$61(1), by its terms fails to require the agency to state its reasons for deviating from examination score order, the statute fabilitates and renders undetectible such impermissible conduct.

Mandatory injunctive relief favoring plaintiffs in their promotion or job applications and a declaration of the unconstitutionality of 561(1) are sought. Defendants have moved to dismiss the complaints for failure to state a claim upon which relief can be granted. Rule 12(b)(6), F.R.Civ.P.

Defendants' motion for judgment on the plendings was originally denied without prejudice on March 12, 1973 by Judge Tyler, who found that the issues here raised were not "essentially

fictitious", "wholly insubstantial" or "obviously frivolous or without merit", Goosby v. Osser, U.S. , 41 U.S.L.W. 4167, 4169, Jan. 17, 1973; hence, he granted plaintiffs' application for the convention of a three-judge court, pursuant to 26 U.S.C. \$2284. Defendants' motions will be treated as made pursuant to F.R.Civ.P. \$56(a) for summary judgment inasmuch as counsel for the parties have submitted affidavits to the three-judge panel.

Argument was heard on June 11, 1973 before the statutory court, after which decision was reserved. It has now been determined, for the reasons set forth below, that defendants are entitled to judgment as prayed.

7

In decisions issued on the same day, Board of Regents v.

Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S.

593 (1972), the Supreme Court made clear that rights to public employment or promotion in a public service system, enforceable under the due process clause of the Fourteenth Amendment, exist only to the extent accorded through statutes or regulations or both, by the public service system in question. In Roth,

Plaintiff, an assistant professor at the Oskosh campus of Wisconsin State University, hired on a tentative basis for expear, was notified by defendant Board of Regents that he would not be granted permanent status on the faculty after his probationary term was up. By its express rule, promulgated pursuant to state statute, the Board of Regents was not obligated to and did not give any reasons for its action, nor did the Board allow Roth a hearing to contest it. Roth brought suit, asserting that he had been deprived of property without due process of law, but it was ultimately determined that he had no property, nor right of any sort. He had only a hope of being made a part of the faculty, as neither the Wisconsin statutory and regulatory scheme nor the contract entered into by Roth and the Board secured him any interest in his future employment.

In <u>Sindermann</u>, plaintiff, a professor at a state junior college in Texas, was told that he would not be rehired at his present post at the expiration of his existing contract. No reasons were given, mor was a hearing provided. Plaintiff, however, had an arguable claim to being tenured, as tenure was defined by his institution and the Co-ordinating Board of

<sup>4/</sup> 408 U.S. at 577-73.

the Texas College and University System, which, if established, would confer upon him an enforceable right to a statement of reasons and a hearing. To deny him such, it was held, would amount to a deprivation without due process. See also, Slochower v. Board of Education, 350 U.S. 551 (1956) (tenured professor at a public college) and Weinan v. Updegraff, 344 U.S. 183 (1952) (professor and staff at a public college dismissed during the term of their contracts).

Section 61(1) of the New York Civil Service Law, let out 5/
above, is a recent codification of a practice or scheme, first tested and sustained in Balcom v. Mosher, 163 N.Y. 32 (1900), designed to reconcile the policy of maintaining a merit system for public employment with the need of the administrator to exercise some control over the composition of his staff. The scheme binds the administrator in a given agency to choose from among the top three eligibles submitted by the appropriate civil service commission; it does not require him, when making that choice, to state his reasons or provide a hearing to those passed over.

<sup>5/</sup> See fn. 2, supra.

Kaminsky v. Leary, 304 N.Y.S. 2d 650, 33 A.D. 2d 552, (1st Dept. 1969), aff'd. 323 N.Y.S. 2d 700, 28 N.Y.S. 2d 959 (1971).

Delicati v. Scheeter, 157 N.Y.S. 2d 715, 3 A.D. 2d 19 (1st Dept. 1956).

Plaintiffs have offered no contradictory authority or relevant contract provision that guarantees their promotion or appointment. Instead, they base their claim on Article V, Section 6, of the Constitution of the State of New York, which in relevant part, provides:

"Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including the cities and villages, shall be made according to merit and fitness to be ascertained as far as practicable, by examination which, as far as practicable, shall be competitive;..."

and the implementation of that provision, the statutory and regulatory scheme of the state and subdivisions thereof for examination and certification of eligibles. (See, generally, in this regard, §650-65 of the New York State Civil Service Law).

Article V, Section 6 of the state constitution, however, by its very language, acknowledges that a strict test score merit system may have to be tempered. The existence of \$61(1) indicates beyond any doubt that this was in fact the conclusion of the New York lawmakers. Plaintiffs, therefore, have no right to the promotions and appointments they seek.

The claim has been advanced by those seeking promotion that their tenured status brings them within the holdings in Roth and Sindermann. But, tenure, as defined therein, referred

to a claim under the applicable civil service system to the new position desired, which plaintiff in Roth lacked, or to the position sought to be retained, as plaintiff in Sindermann arguably possessed. Simply put, plaintiffs here are situated as was Roth; they have not attained tenure in the positions they seek.

II

Plaintiffs press the contention that, at the least, the administrator exercising his discretion under \$61(1) should be required to set forth his reasons for so acting, lest he be tempted to pass over eligibles due to racial, religious or sexual bias or caprice. A statement of reasons, it is asserted, would permit effective judicial scrutiny and detection of clearly unconstitutional conduct.

This claim arose in Roth. Plaintiff there had alleged that he had not been re-hired as a punishment for the exercise of his First Amendment rights - i.e. criticism of the university administration. But, proceedings on this issue had been stayed in the district court and therefore, were not directly before the Court of Appeals or the Supreme Court. The Seventh Circuit,

however, in what seems to have been obiter dictum, determined that due process required an agency to give reasons and hold a hearing

"...as a prophylactic against non-retention decisions improperly notivated by exercise of protected rights...."
446 F.2d at 810.

The Supreme Court in rejoinder found that Roth had no right to stated reasons or a hearing because of his lack of tenure, as discussed above, and did not comment on this aspect of the Court of Appeals opinion other than to mention it.

The uncertainty was alleviated in <u>Sindermann</u>. The Fifth Circuit had advanced the same proposition as did the Seventh circuit in <u>Both</u>, and it was flatly rejected.

"The Court of Appeals suggested that respondent might have a due process right to some kind of hearing simply if he asserts to college officials that their decision was based on his constitutionally protected conduct. 430 F.2d, at 944. We have rejected this approach in Board of Regents v. Roth, ante, p. 564, at 575 n. 14 (408 U.S. 599 n. 5)."

Plaintiffs urge, nonetheless, that their claim has merit as an "entitlement", the right of an individual to demand that

<sup>8/</sup> 408 U.3. at 574-75, fn. 14.

that government in effect grant hearings and give written reasons for hiring and promotion decisions as a matter of due process of law. E.g. Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (revocation of driver's license).

There is no entitlement here. Plaintiffs are not being deprived of something they now enjoy, as was the recipient of welfare benefits in Goldberg and the holders of driver's licenses in Bell. Those seeking promotions remain in their present civil service posts, with tenure and in good standing therein, and those seeking appointment are in the same position as any unsuccessful job applicant in the private sector.

# CORCLUSION

There being no right to appointment or promotion in public service by virtue of examination scores, and no basis for the sweeping prophylactic function plaintiffs would assign due process in this context, the applications for injunctive and declaratory relief must be and are denied. Defendants' motion

for judgment pursuantito F.R.Civ.P.g56(a) in granted. Settle order and judgment accordingly.

Dated! September /11, 1973

Circuit Judes
Paul R. Hayes

District Julia